

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

Lassie Togs, Inc.

:

:

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Corporation
Franchise Tax under Article(s) 9A of the Tax Law:
for the Fiscal Years 1/31/79-1/31/81.

State of New York :

ss.:

County of Albany :

David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 26th day of September, 1986, he/she served the within notice of Decision by certified mail upon Lassie Togs, Inc. the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Lassie Togs, Inc.
112 W. 34th St.
New York, NY 10001

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
26th day of September, 1986.

David Parchuck
Authorized to administer oaths
pursuant to Tax Law section 174

Janet M. Snay

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

Lassie Togs, Inc.

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AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Corporation
Franchise Tax under Article(s) 9A of the Tax :
Law for the Fiscal Years 1/31/79-1/31/81.

State of New York :

ss.:

County of Albany :


David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 26th day of September, 1986, he served the within notice of Decision by certified mail upon Harry Wasserman, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

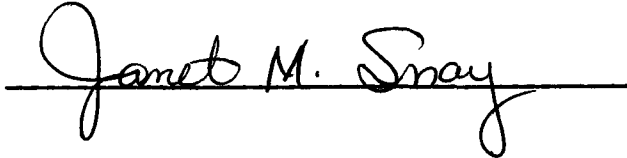
Harry Wasserman
Weinick, Sanders & Co.
1515 Broadway
New York, NY 10036

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
26th day of September, 1986.


Authorized to administer oaths
pursuant to Tax Law section 174



STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

September 26, 1986

Lassie Togs, Inc.
112 W. 34th St.
New York, NY 10001

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1090 of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Audit Evaluation Bureau
Assessment Review Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2086

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

Petitioner's Representative:
Harry Wasserman
Weinick, Sanders & Co.
1515 Broadway
New York, NY 10036

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

LASSIE TOGS, INC.

for Redetermination of a Deficiency or for
Refund of Corporation Franchise Tax under
Article 9-A of the Tax Law for the Fiscal
Years Ended January 31, 1979, January 31,
1980, and January 31, 1981.

DECISION

Petitioner, Lassie Togs, Inc., 112 West 34th Street, New York, New York 10001 filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the fiscal years ended January 31, 1979, January 31, 1980 and January 31, 1981 (File No. 47485).

A formal hearing was held before Jean Corigliano, Hearing Officer, at the office of the State Tax Commission, Two World Trade Center, New York, New York on March 20, 1986 at 9:30 A.M., with all briefs to be submitted by July 7, 1986. Petitioner appeared by Harry Wasserman, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Michael J. Glannon, Esq. of counsel).

ISSUE

Whether petitioner properly included the wages of certain individuals in computing its business allocation percentage.

FINDINGS OF FACT

1. Petitioner, Lassie Togs, Inc. ("Lassie"), filed a State of New York Corporation Franchise Tax Report for each of the fiscal years ended January 31, 1979 through January 31, 1981. On each report, petitioner claimed a business allocation which was computed, in pertinent part, by including in its calculations

the wages of five individuals working at the Virginia facilities of a Lassie affiliate.

2. On May 24, 1983, the Audit Division issued three notices of deficiency to Lassie asserting taxes due pursuant to Article 9-A of the Tax Law in the amounts of \$1,487.00 plus interest for the year ended January 31, 1979; \$3,222.00 plus interest for the year ended January 31, 1980; and \$4,637.00 plus interest for the year ended January 31, 1981.

3. On audit, the auditor determined that Lassie had failed to report administrative fees it received for services performed in New York. In addition, the auditor disallowed the wages of the Virginia employees which Lassie had included in calculating its payroll factor. Following a prehearing conference, the Audit Division conceded that the fees should be excluded from receipts because they represented a reimbursement of expenses incurred by Lassie in performing administrative services for affiliated companies; however it rejected the contention that the five Virginia individuals were Lassie employees. The auditor adjusted the payroll factor by subtracting salaries paid to those individuals and allocating 100 percent of Lassie's payroll to New York State. As a result of the conference, the auditor reduced the asserted tax due as follows: \$1,327.00 plus interest for fiscal year ended January 31, 1979; \$2,917.00 plus interest for the fiscal year ended January 31, 1980; and \$3,108.00 plus interest for the fiscal year ended January 31, 1981.

4. Lassie is a subsidiary of Roanna Togs, Inc. ("Roanna"). It markets infants' and small children's clothing and has showrooms, offices and other facilities in New York City for that purpose. Until 1962, Lassie also operated a factory on Long Island where the clothing was produced. Because of an increase in labor related problems, Lassie began looking for an alternative

manufacturing site and eventually opened a new factory in Louisa, Virginia and organized Louisa Manufacturing Corporation ("Louisa") to operate it. At that time, Louisa was a subsidiary of Lassie, but after Roanna's organization both corporations became subsidiaries of Roanna. The officers of all the related corporations are the same individuals.

5. At the time factory operations were moved to Virginia, Lassie's top management wanted to maintain a layer of management between itself and Louisa, as Lassie's comptroller put it, "to have eyes and ears at the factory" loyal to Lassie. Two factory supervisors from New York, the plant manager and cutting room supervisor, chose to move with the manufacturing operation to perform this function. These individuals each had over fifteen years of experience with Lassie and participated in its profit sharing, pension, health benefits and group life insurance plans. Transfer from the Lassie to the Louisa payroll would have cost them major losses in benefits. Therefore, in order to smooth the transition and to maintain a presence in Virginia, Lassie kept these individuals on its own payroll.

6. During the three years at issue, Lassie maintained five supervisory employees in Virginia: the two individuals described above, the shipping supervisor, the sewing floor supervisor and the quality control supervisor. Lassie withheld all federal and state taxes, paid social security and Virginia unemployment insurances and provided fringe benefits, including health and life insurance policies and pension plans, for these five employees. The individuals in question reported directly to Lassie's management by whom they were hired and to whom they were responsible.

7. Louisa reimbursed Lassie for the salaries and payroll taxes expended by Lassie on behalf of these five individuals. This reimbursement was accomplished

in the form of an accounting report entry made on the annual financial statement of Roanna. The comptroller of Roanna and its subsidiaries explained that the entry was intended to provide Roanna's management with information and analysis regarding Louisa and did not represent an actual transfer of assets. Roanna filed a consolidated federal tax return for the years in issue reporting salaries and wages as a consolidated expense and not an expense of a particular corporation.

CONCLUSIONS OF LAW

A. That section 210.3 of the Tax Law provides, in part, that a taxpayer's entire net income may be allocated within New York State by multiplying its business income by a business allocation percentage. The business allocation percentage is obtained by a three factor formula consisting of a property factor, a receipts factor and a payroll factor. The payroll factor is computed by:

"ascertaining the percentage of the total wages, salaries and other personal service compensation, similarly computed, during such period of employees within the state, except general executive officers, to the total wages, salaries and other personal service compensation, similarly computed, during such period of all the taxpayer's employees within and without the state, except general executive officers" (Tax Law § 210.3[a][3]).

B. That 20 NYCRR 4-5.2(b) provides that:

"[g]enerally, the relationship of employer and employee exists when the taxpayer has the right to control and direct the individual not only as to the result to be accomplished by him but also as to the means by which such result is to be accomplished. If the relationship of employer and employee exists, the designation or description of the relationship, and the measure, method or designation of the compensation are immaterial."

C. That because the individuals located in Virginia were hired by Lassie, supervised by Lassie and ultimately responsible to Lassie, the individuals were employees of Lassie within the intent and meaning of section 210.3 of the Tax


Law. Since the reimbursement from Louisa to Lassie was merely a financial accounting technique, it cannot be said that Louisa bore the ultimate expense of the five employees. This is consistent with this Commission's decision in Mix 'N' Match of Miami, Inc. (State Tax Comm., January 18, 1985), involving related companies. In that decision, the petitioner (also a Lassie affiliate) sought to exclude from its business allocation percentage reimbursements for salesmen's services paid by Mix 'N' Match to Lassie. There, as here, it was determined that Lassie maintained actual control and direction over the employees and that the reimbursement of salaries by Mix 'N' Match to Lassie was merely a bookkeeping adjustment not affecting the ultimate determination.

D. That the petition of Lassie Togs, Inc. is granted and the notices of deficiency issued on May 24, 1986 are cancelled.

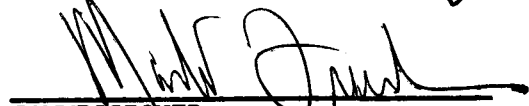
DATED: Albany, New York

SEP 26 1986

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER